LOY CHIN HEI

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[CRIMINAL APPLICATION NO. 2 OF 1981]
6 MAY 1981

CRIMINAL PROCEDURE: *Bail - Whether offence bailable or non-bailable - Whether the High Court was precluded from exercising its discretionary powers over bail.*

The accused was refused bail by the Sessions Court judge and he applied to the High Court for bail pending the disposal of the charge against him. The issues before the court were (1) whether s. 41 of the Dangerous Drug Act would make the offence non-bailable and (2) whether the High Court was precluded from exercising its discretionary powers over bail.

Held:

[1] Section 41B of the Dangerous Drug Act (the Act) makes an offence under it an absolutely unbailable offence. The Act was a particular subsequent legislation and it must be construed as having curtailed the discretion to grant bail in drug offences punishable with death or life imprisonment previously vested in the Courts by an earlier general legislation which is the Criminal Procedure Code.

[2] The restriction on bail under s. 41B of the Dangerous Drugs Act is absolute. The Courts cannot allow bail to any person charged with any offence punishable with death or more than 5 years imprisonment.

[Application for bail refused.]

Cases referred to:
Sulaiman bin Kadir v. Public Prosecutor [1976] 2 MLJ 37
Che Su binti Daud v. Public Prosecutor [1978] MLJ 162

Legislation referred to:
Criminal Procedure Code, ss. 2, 3, 387, 388, 389, 394
Dangerous Drugs Act 1952, ss. 6B(1)(a), 39B(2), 41B

For the applicant - F.H. D'Cruz
For the respondent - C.W. Chan (DPP)

JUDGMENT

Wan Yahya J:

This is an application by a person accused of an offence under s. 6B(1)(a) of the Dangerous Drugs Act 1952, for bail pending disposal of the charge against him. He had been earlier produced before the President of the Sessions Court, Melaka on 15 April 1981 but he was denied bail by the learned President in view of s. 41B of the Act.

At the commencement of hearing before this Court his counsel, Mr. Hilary D'Cruz, with his usual precision, laid down two points for consideration of appeal, as follows:

(i) Whether s. 41B of the Dangerous Drugs Act would make the offence non-bailable or preclude bail: and

(ii) In either of these two events whether the High Court is precluded from exercising its discretionary powers over bail.

Counsel first drew the subtle distinction between a non-bailable offence and an unbailable offence. He contends that non-bailable offences, as defined under "bailable offence" in s. 2 of the Criminal Procedure Code include all offences, including those outside the Code, should be either bailable or unbailable offences. Following this reasoning, counsel argued, the offence under s. 6B(1)(a) of the Dangerous Drugs Ordinance would therefore fall under "non-bailable offence."

It is of particular interest to note that, although the Criminal Procedure Code makes a specific definition of "bailable offence" the draftsman deliberately avoided the use of that term in s. 387 of the Code and instead employs the words "person other than a person accused of a non-bailable offence" as those entitled to be released in bail. It would seem that the intention of the legislature is not only to confine this right to bail to bailable cases of the Penal Code only but to extend it to offences against other statutes as well. This, at first sight, may lend some support to counsel's argument. I accept the view that where any statutory offence other than the Penal Code is silent or makes no provision as to bail, then the First Schedule to the Criminal Procedure Code will apply and the offences can be classified either as bailable or non-bailable according to the provisions of the Schedule. However, the provisions only apply to cases where the particular statute creating the offence is silent on the question of bail. In my view, if provision is made in a later legislation, then the later provision will prevail over the provisions of the Criminal Procedure Code. The Code is not enacted with the absolute purpose of laying down a singularly mandatory procedure for all criminal offences but is intended for application to offences in which no provision for procedure is laid down. This intention is clear from s. 3 of the Criminal Procedure Code, which reads:

> All offence under the Penal Code shall be required into the tried according to the provisions hereinafter contained, and all offences under any other law shall be inquired into the tried according to the same provisions; subject however to any written law for the time being in force regulating the manner or place of inquiring into or trying such offences.
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> (The emphasis is mine.)

A non-bailable offence is no doubt an offence in respect of which the accused may be refused bail, but it is not an absolutely unbailable offence because the Court has been given the discretionary power to grant bail in certain circumstances and, in the case of offences punishable with life imprisonment or death, for special reasons. The High Court, it would appear by s. 394, has absolute power to grant bail. However this discretion is, as indicated earlier, only exercisable where no specific provision exists in the statute creating the offence. In our present case the provision for bail does exist. Section 41B has the effect of making the offence under the dangerous Drugs Act an absolutely unbailable offence.

Mr. D'Cruz's next argument is that even if s. 41B of the Dangerous Drugs ordinance has the effect of rendering the offence absolutely unbailable, the section was intended to restrict the discretionary power of bail by the Court having original jurisdiction only and in this

case the Sessions Court and not the High Court. He made particular reference to the case of *Sulaiman bin Kadir v. Public Prosecutor[1976] 2 MLJ 37,* but I am unable to see how it could be of much assistance here. Perhaps counsel's intention is to illustrate from the orbiter of Harun J. at p. 38 to the effect that when a statute creates an offence it should also include provision for bail and that the power to grant bail should properly be conferred on the particular Court given jurisdiction to try it. Both points, to mind, do not suggest the confinement of such power to the trial Court only.

It has also been urged upon me to adopt the course taken in the case of the *Che Su binte Daud v. Public Prosecutor [1978] MLJ 162,* where Gunn Chit Tuan J., apparently in exercise of the powers under s. 38 and 389 of the Criminal Procedure Code, admitted to bail an accused person charged under s. 39B(2) of the Dangerous Drugs Act, an offence punishable with death or life imprisonment. Judgment in Che Su case was given barely 4 days after s. 41B of the Dangerous Drugs Act came into effect. This and the obvious absence of reference to, or even any mention made of, s. 41 by the learned judge in his judgment, points out strongly to the possibility that the matter was missed and was neither raised nor discussed by the parties before the learned judge. I am convinced that had the learned judge's attention been drawn to the provision of this newly enacted law, his decision would have been entirely different.

I have had several occasions to look at s. 41B of the Dangerous Drugs Act and it appears to me that the section contains not only express provisions which make the offence absolutely unbailable but also expresses in unequivocal language the intention of the legislature to restrict the judicial discretion as contained in the Criminal Procedure Code and other judge made laws. The expression 'notwithstanding any written law or any rule of law' to my mind, would include the provisions of the Criminal Procedure Code and also judge made laws or judicial precedents on bail. Section 41B of the Dangerous Drugs Act, being a particular subsequent legislation, must be construed as having curtailed the discretion to grant bail in drug offences punishable with death or life imprisonment previously vested in the Courts by an earlier general legislation, i.e., the Criminal Procedure Code. When an Act enacts something in general items and afterwards another Act on a particular subject introduces in express terms special restriction on that subject, then the rule of construction demands that the provisions in the subsequent particular legislation should prevail and the provisions of the earlier legislation deemed curtailed or restricted to the extent of its inconsistency with the later legislation but not necessarily repealed.

The discretion as generally given by s. 388, 389 & 394 of the Criminal Procedure Code has been effectively taken away from the Courts, both the subordinate and High Courts, by s. 41B of the Dangerous Drugs Act. Disconcerting as it may be for us to witness the power of the Courts, both the Sub Dangerous Drugs Act. Disconcerting as it may be those relating to the liberty of the subject who is accused but yet to be proven guilty, being gradually whittled away by statute, yet when Parliament has expressed in unequivocal language its intention to curtail this discretionary power, the Courts are not free to question its wisdom in providing for a deterrent procedure for an obviously baneful mischief to society, but must interpret and give effect to the law as it stands.

The restriction on bail under s. 41B of the Dangerous Drugs Act is absolute. Neither the Courts below, nor this Court, now possess the power to admit to bail any person charged thereunder with any offence punishable with death or more than five years' imprisonment, or even for lesser terms when the Public Prosecutor certifies that it is against public interest to allow bail

The application for bail is therefore refused.

Also found at [1981] CLJ 177